(2)

Supreme Court, U.S.
FILED
APR 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1457

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

In the Matter of the Application of
BANKERS TRUST NEW YORK CORPORATION
AND CONSOLIDATED SUBSIDIARIES,

Petitioners-Appellants,

-against-

DEPARTMENT OF FINANCE OF THE CITY
OF NEW YORK AND PAUL A. CROTTY, AS
COMMISSIONER OF FINANCE,

Respondents-Appellees.

On Appeal from the Appellate Division
of the Supreme Court,
First Department, of the State of New York

MOTION TO DISMISS

PETER L. ZIMROTH,
Corporation Counsel
of the City of New York,
Attorney for Appellees,
100 Church Street,
New York, New York 10007.
(212) 566-3643 or 3005

GLENN NEWMAN,
STANLEY BUCHSBAUM,
JAMES F. ELLER,

of Counsel.

35pp

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	2
New York City Statute Involved	3
Enabling Act	3
Model Local Law	4
Financial Corporation Tax	4
Statement of the Case	5
POINT I: THE DETERMINATION OF THE NEW YORK COURTS RESTED ON AN ADEQUATE AND INDEPENDENT STATE GROUND	9
POINT II: THE TAX IS A FRANCHISE TAX. IT IS IMPOSED FOR THE PRIVILEGE OF DOING BUSINESS IN A CORPORATE CAPACITY. ALTERNATIVELY, THE CITY TAX IS ANOTHER NONPROPERTY TAX IN LIEU OF A FRANCHISE TAX BECAUSE IT WAS ENACTED PURSUANT TO EXPRESS STATE AUTHORIZATION	19
CONCLUSION	29

TABLE OF AUTHORITIES

Cases

	Page
California v. Central Pacific R.R. Co., 127 U.S. 1 (1888)	27
City of Poplar Bluff v. Poplar Bluff Building and Loan Association, 369 S.W.2d 764 (Mo. Ct. of App. 1963)	24
City of Trenton v. State of New Jersey, 262 U.S. 182 (1923)	24
Colonial Pipeline Co. v. Collector of Revenue of Louisiana, 421 U.S. 100 (1975)	20, 21
Commissioner of Corporations & Taxation v. City of Malden, 321 Mass. 46, 71 N.E.2d 601 (Mass. Sup. Jud. Ct. 1947)	25
Edward Brown & Sons v. McColgan, 53 Cal.2d 604, 128 P.2d 186 (Calif. Dist. Ct. 1942)	22
Home Insurance Co. v. New York State, 134 U.S. 594 (1890)	20, 27
McKittrick ex rel. City of California v. Missouri Utilities Co., 339 Mo. 385, 96 S.W.2d 607 (Mo. Sup. Ct. 1936)	24, 25

Matter of Johnson v. New York State Tax Comm. 117 A.D.2d 867, 498 N.Y.S.2d 581 (3d Dep't 1986) 15

Memphis National Gas Co. v. Chairman, State Tax Commission, 335 U.S. 80 (1948) 20

Michigan v. Long, 463 U.S. 1032 (1983) 12

Monroe County Savings Bank v. The City of Rochester, 37 N.Y. 365 (1867) 27

Morgan v. Louisiana, 93 U.S. 217 (1877) 20

New York Central R.R. Co. v. Middleport Gas & Electric Light Co., 193 A.D. 273, 184 N.Y.S. 221 (4th Dep't 1920) 24

New York Terminal Co. v. Gaus, 204 N.Y. 512, 98 N.E. 11 (1912) 20

New York ex rel. The United States Aluminum Printing Plate Co. v. Knight, 174 N.Y. 475, 67 N.E. 65 (1903) 20

Pacific Co., Ltd. v. State Treasurer, 285 U.S. 480 (1932) 20

Persky v. Bank of America Nat. Assn., 261 N.Y. 212, 185 N.E. 77 (1933) 16

Schwinden v. Burlington Northern, Inc., 691 P.2d 1351 (Mont. Sup. Ct. 1984)... 22

Standard Manufacturing Co., Inc. v. Tax Commission of the State of New York, 114 A.D.2d 138, 498 N.Y.S.2d 724 (3d Dep't), aff'd, 69 N.Y.2d 635, 503 N.E.2d 694 (1986) 20, 21

State ex rel. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, 53 S.W.2d 394 (Mo. Sup. Ct. 1932) 27

Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1983) 15

United States v. Wheeler, 435 U.S. 313 (1978) 24

Village of Elmira Heights v. Yungstrom, 272 A.D. 154, 72 N.Y.S.2d 655 (3d Dep't 1947) 25

Western States Bankcard Association v. City and County of San Francisco, 19 Cal.3d 208, 561 P.2d 273 (Calif. Sup. Ct. 1977) 27, 28

West Pub. Co. v. McColgan, 127 Cal.2d 705, 166 P.2d 861 (Calif. Sup. Ct.), aff'd per curiam, 328 U.S. 823 (1946) 22

Statutes

31 U.S.C. §742 (1970)..... 5

31 U.S.C. §3124 (1986)..... 5

New York City Administrative Code §R46-1.0 et seq. 4, 19

New York State Civil Practice Law and Rules §2221 (1986) 15

New York State L.1966, c.772, as amended by L.1966, cc.776 and 780, eff. July 1, 1966 ..... 3, 19

Secondary Materials

71 Am. Jur.2d State and Local Taxation §266 (1973) 21

Black's Law Dictionary 593 (5th ed. 1979) 21

Cohen & Karger, Powers of the New York Court of Appeals (1952), chapter 17.. 17

14A Fletcher, Cyclopedia of Law of Private Corporations §6954 (1980) 26

McQuillin, Municipal Corporations §34.03 (3d ed. 1985) 21

24 N.Y. Jur. Franchises §1 (1943) ... 21

No. 86-1457

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

In the Matter of the Application of
BANKERS TRUST NEW YORK CORPORATION
AND CONSOLIDATED SUBSIDIARIES,

Petitioners-Appellants,

-against-

DEPARTMENT OF FINANCE OF THE CITY
OF NEW YORK AND PAUL A. CROTTY, AS
COMMISSIONER OF FINANCE,

Respondents-Appellees.

On Appeal from the Appellate Division
of the Supreme Court,
First Department, of the State of New York

MOTION TO DISMISS

Appellees move to dismiss the appeal because of the absence of any federal question or to dismiss it on the ground that none of the questions stated in the Jurisdictional Statement presents a substantial federal question.

PRELIMINARY STATEMENT

Appellants appeal from an order of the Appellate Division of the Supreme Court, First Department, of the State of New York, dated and entered May 27, 1986, which confirmed the determination of appellee Paul A. Crotty, as Commissioner of Finance (20a-21a)*. By an order entered September 11, 1986, the Court of Appeals of the State of New York, sua sponte, dismissed an appeal taken to it as of right on constitutional grounds for lack of a substantial constitutional question (22a). Appellants then requested leave to appeal. By an order entered December 16, 1986, the Court of Appeals denied appellants' motion (23a).

The order under review confirmed a determination based on a hearing officer's

---

*Page references designated "-a" refer to pages in Appellants' Jurisdictional Statement.

report in which he found that appellants' late claim, that New York City could not tax the interest earned on appellants' federal obligations, was not properly before the Bureau of Hearings.

NEW YORK CITY STATUTE INVOLVED

Annexed to appellants' Jurisdictional Statement are New York State's Tax Enabling Act (1a-2a), the Model Law it contains (2a-6a), and the New York City Financial Corporation Tax adopted pursuant to it (6a-13a).

ENABLING ACT

The enabling act (N.Y. L.1966, c.772, as amended by L.1966, cc.776 and 780, eff. July 1, 1966) enables any city having a population of one million or more, acting through its local legislative body, to raise tax revenue by authorizing the imposition of taxes on general, financial, insurance and transportation corporations and on unincorporated businesses (1a). It expressly requires that any local law

or laws enacted pursuant to the enabling act be substantially in compliance with the detailed model local law (2a).

MODEL LOCAL LAW

The relevant portion of the model local law, §12, authorizes the imposition of a Financial Corporation Tax on state banks, trust companies, financial corporations and savings and loan associations. Section 12 provides that the tax is to be based on net income and states that it is for the privilege of doing business in the city (2a). Section 20 provides that gross income shall include all interest received from federal, state, municipal or other bonds (3a).

FINANCIAL CORPORATION TAX

The New York City Financial Corporation Tax is imposed for the privilege of doing business in the City in a corporate or organized capacity (6a). New York City Administrative Code §R46-1.0 et seq. (renumbered §11-601 et seq. (1986)) The relevant section specifically

provides that entire net income shall be computed without the deduction or exclusion of any part of income from dividends or interest on any kind of stock, securities or indebtedness (7a).

STATEMENT OF CASE

Appellants, a New York corporation and its subsidiaries, brought this action for a judgment declaring that the New York City Financial Corporation Tax improperly includes interest earned on federal obligations in computing taxable net income. Appellants' argument was grounded on the assertion that the imposition of this tax was prohibited by Rev. Stat. §3701, 31 U.S.C. §742 (1970). This is reprinted at pages 3a-4a of Appellants' Jurisdictional Statement. In 1982, this statute was codified without substantive change. The codified version, 31 U.S.C. §3124 (1986), is reprinted at page 4a of Appellants' Jurisdictional Statement.

Appellants argue that the City Tax is improper because it is not a franchise tax or other nonproperty tax in lieu thereof. They also argue that they timely raised this issue before the Bureau of Hearings. The Hearing Officer at the outset rejected appellants' timeliness contention, specifically finding that "the claim raised by [appellants] after the close of the hearing in the within matter [was] not properly before the Bureau of Hearings" (17a). He also rejected appellants' claim on the merits, but did so only after stating that "even had petitioner's post-hearing claim been reviewable" (17a-17b). Thereafter, appellee Paul A. Crotty issued a final determination, based on the hearing determination, denying the post-hearing claim.

It should be noted that the issues at the hearings had nothing to do with interest on federal obligations. The appellants had paid tax based on such interest since 1966, when the

tax was first imposed. The hearings related to a tax imposed for 1977 and involved the issue of allocation of income between appellants' branches in the City and those located off-shore. The amount of the original assessment under review was later increased by a revised notice of determination. This increase lead to the reopening of the hearings. It was only after the reopened hearings were closed that appellants for the first time submitted the interest claim in issue. The issue with regard to allocation was disposed of by settlement before the Hearing Officer prepared his findings.

Upon appeal to the Appellate Division of the Supreme Court, First Department, the Crotty determination was confirmed (20a-21a). Appellants appealed as of right on constitutional grounds to the Court of Appeals. The Court of Appeals, sua sponte, dismissed the appeal on the ground that no substantial constitutional

question was involved (22a). Appellants then made a specific application to the Court of Appeals for leave to appeal to that Court. This motion was denied (23a).

POINT I

THE DETERMINATION OF THE NEW YORK COURTS RESTED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

This Court should not entertain the appeal since the determination sought to be reviewed was based on an adequate and independent state ground.

In this, as in other non-property tax cases in New York City, an administrative hearing is followed by a determination of the Commissioner of Finance based on the findings of the administrative officer who conducted the hearing. The Hearing Officer pointed out that the issues before him at the hearing and at the re-opened hearing had been disposed of by a settlement agreement (14a, 15a). He stated that the remaining issue was whether the post-hearing claim that the income from interest on United States obligations was exempt from the tax "was properly before the Bureau of

Hearings" (15a). His conclusions of law provided (17a):

> "F. That the claim raised by petitioner after the close of the hearing in the within matter is not properly before the Bureau of Hearings."

The next conclusion of law started with the phrase, "That even had petitioner's post-hearing claim been reviewable by the Bureau of Hearings," and then continued to state that the burden of proof had not been met (17a). The Hearing Officer then went on to reach conclusions adverse to appellants' claim. In dealing with the federal constitutional issue, he first stated that "Even if we could reach the merits," and then concluded that appellants' position on the merits was unsound (18a).

The review of the final determination based on these findings was transferred to the New York intermediate appellate court, the Appellate Division of the Supreme Court, First Department. That Court unanimously confirmed

the final determination without opinion or memorandum (20a-21a). Appellants then appealed as of right on constitutional grounds to the New York Court of Appeals. That Court, sua sponte, dismissed the appeal "upon the ground that no substantial constitutional question was directly involved" (22a). Appellants thereafter, as is permissible in New York after the dismissal of an appeal taken as of right, made an application to the Court of Appeals for leave to appeal to that Court. This motion was denied (23a).

Since neither the Court of Appeals nor the Appellate Division wrote any explanation of their actions in this matter, the only explanation for the decision is that contained in the Hearing Officer's decision. It is plain that his determination was based on the ground that the issue with regard to interest exemption by reason of Rev. Stat. §3701 was not properly before him because the claim in this regard was

raised after the close of the hearing. It is true that he also reached conclusions about the issue on the merits, but he did so only after stating that this would be the result "if we could reach the merits (18a)."

The determination under review rested solely on the state ground concerning the timeliness of raising the claim after the hearing. The issue on the merits, the federal ground, was not the basis of the determination. It was discussed only on the basis of what might have been done if the issue could have been reached. Nothing in the actions of the New York appellate courts indicates that their determinations rested on any ground other than that relied on by the hearing officer.

Thus, nothing in Michigan v. Long, 463 U.S. 1032 (1983), or in any related subsequent case, furnishes any basis for concluding that the present case was not decided on an adequate and independent state ground. Unlike

Long we are not dealing with a determination in which the opinion referred briefly to a state ground, but otherwise relied exclusively on federal law. It is not a case which fairly appears to rest primarily on federal law or to be interwoven with federal law. On the other hand, if we treat the hearing officer's decision as that of a state court, it indicates clearly and expressly that it is based on a bona fide separate, adequate and independent state ground.

Even if the Hearing Officer's decision cannot be treated as the state court decision, the situation would then be a complement of that involved in the Long and similar cases. In Long, the indications were strong that the state court decision rested on federal grounds. We are not here dealing with a case where the grounds or cases relied on in an opinion were federal or where there are other strong indications that a federal ground was

determinative. Here the report of the Hearing Officer clearly was based on a state ground, the failure to raise the federal issue until some time after the hearing had been closed, reopened and then finally closed. Neither the Appellate Division in affirming, nor the Court of Appeals in dismissing or in later denying leave to appeal, wrote an opinion or memorandum of law.

In these circumstances there is strong reason to believe that the appellate courts rested their decision on the state ground relied on by the Hearing Officer. To stretch the Long case to hold that, despite rather clear indications that the decision was rested on state grounds, a case must, in effect, be presumed to have been decided on the federal grounds, would violate another governing principle. It is a fundamental rule of judicial restraint that the Court will not reach constitutional questions in advance of the necessity of deciding them.

Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 157-58 (1983). Moreover, many of the basic principles on which Long was decided would be violated if strong evidence that the case was decided on state grounds must be disregarded unless there is proof beyond any doubt that a state ground was the basis for the decision.

Appellants argue that they are not barred from raising a new issue after the hearings have been finally closed because no statute or regulation imposes a time limit on raising new issues. In New York at least, the rule would appear to be just the opposite, that, once a trial or a hearing is closed, the right to reopen generally requires a statute or regulation. See, e.g., N.Y. Civil Practice Law and Rules §2221.

Appellants rely on Matter of Johnson v. New York State Tax Comm., 117 A.D.2d 867, 498 N.Y.S.2d 581 (3d Dep't 1986). The

principle followed in that case is somewhat similar to decisions of the New York Court of Appeals. In Persky v. Bank of America Nat. Assn., 261 N.Y. 212, 217, 185 N.E. 77 (1933), the Court of Appeals said that it would not reverse a judgment on the basis of new questions not raised below, and it repeated the general rule that a party who obtained a judgment would not even be allowed to sustain it on grounds not considered in the court below

The Court held, however, that it was dealing with questions raised below and all that was new was the nature of the argument to support the questions. Id. at 218. Before considering the new argument, the Court stated, id. at 218-19:

> Trials are held to enable parties to bring to the court for decision disputed questions of fact or law, and parties who fail to avail themselves of the opportunity offered them to present such questions of fact or law to a trial court cannot on appeal

present them for decision in this court.

See also Cohen & Karger, Powers of the New York Court of Appeals (1952), chapter 17.

It may be argued that the issue appellants seek to review is one of law and that it, therefore, could be raised after the hearings had finally been closed. That, however, is not so. The Hearing Officer noted that the issue "raised questions of fact and law" (15a). The question of fact involved is the amount of income earned from obligations of the United States. The Jurisdictional Statement, at page 5, refers to $26,043,451 as the amount of interest received by Bankers Trust on federal obligations. The record is so lengthy that it is possible we may have missed any reference to this amount in its more than 2,150 pages of transcript and 22 Exhibits. One or more of the Exhibits, including Exhibit 18, seems to include all varieties of interest from federal obligations.

Yet the grand total of these amounts is several million dollars less than the amount claimed.

A trial or a hearing would be necessary to determine the amount of interest earned from federal obligations. Even if the record contained testimony or proof stating the amount of interest, without any inconsistency with exhibits introduced by appellants, there would still remain an issue of fact to be decided. Appellees would have the right to challenge the amount claimed as federal interest or to insist on proof showing the amount received. In the absence of uncontradicted proof of the amount, the issue of amount would have to be decided as a question of fact. Here, of course, the issue never arose because the claim of exemption for federal interest was not raised until after the hearing was finally closed.

POINT II

THE TAX INVOLVED IS A FRANCHISE TAX. IT IS IMPOSED FOR THE PRIVILEGE OF DOING BUSINESS IN A CORPORATE CAPACITY. ALTERNATIVELY, THE CITY TAX IS ANOTHER NONPROPERTY TAX IN LIEU OF A FRANCHISE TAX BECAUSE IT WAS ENACTED PURSUANT TO EXPRESS STATE AUTHORIZATION.

(1)

The Financial Corporation Tax imposed by the City is a franchise tax because its nature and operation indicate that it is imposed "[f]or the privilege of doing business in the city in a corporate or organized capacity . . ." N.Y.C. Admin. Code §R46-37.1. The quoted language is identical with the language in the imposition section of the model law, as enacted by the State legislature. New York L.1966, c.772 [Corporate Business Tax, Model Law, §3].

The term franchise has been consistently equated with the term privilege. For over 100 years, this Court has considered a franchise tax to be a tax imposed for or on a privilege. See, e.g., Colonial Pipeline Co. v. Collector of Revenue of Louisiana, 421 U.S. 100, 102, 111-12, (1975); Memphis National Gas Co. v. Chairman, State Tax Commission, 335 U.S. 80, 85-93 (1948); Pacific Co., Ltd. v. State Treasurer, 285 U.S. 480, 490 (1932); Home Insurance Co. v. New York State, 134 U.S. 594, 599 (1890); Morgan v. Louisiana, 93 U.S. 217, 223 (1877).

New York courts, in cases involving a variety of circumstances, have considered franchise to be synonymous with privilege. See, e.g., New York Terminal Co. v. Gaus, 204 N.Y. 512, 515, 98 N.E. 11 (1912); New York ex rel. the United States Aluminum Printing late Co. v. Knight, 174 N.Y. 475, 478, 67 N.E. 65 (1903); Standard Manufacturing

Co., Inc. v. Tax Commission of the State of New York, 114 A.D.2d 138, 498 N.Y.S.2d 724 (3d Dep't), aff'd, 69 N.Y.2d 635, 503 N.E.2d 694 (1986). Additionally, scholars and legal commentators have invariably defined franchise as privilege. See, e.g., Black's Law Dictionary 593 (5th ed. 1979); 71 Am. Jur.2d State and Local Taxation §266 (1973); 24 N.Y. Jur. Franchises §1 (1943); McQuillin, Municipal Corporations §34.03 (3d ed. 1985).

This association of franchise with privilege has continued when "corporate franchise tax" has been defined. It has been repeatedly held that a corporate franchise tax is a tax imposed on the privilege of doing business in a corporate capacity. For example, this Court has upheld a corporate franchise tax imposed on the privilege of carrying on an interstate business in the corporate form. Colonial Pipeline Co. v. Collector of Revenue of Louisiana, 421 U.S. at 113-114. Similar results

have been reached by state courts. See, e.g., Schwinden v. Burlington Northern, Inc., 691 P.2d 1351, 1359 (Mont. Sup. Ct. 1984); West Pub. Co. v. McColgan, 127 Cal.2d 705, 166 P.2d 861, 863 (Calif. Sup. Ct.); aff'd per curiam, 328 U.S. 823 (1946); Edward Brown & Sons v. McColgan, 53 Cal.2d 504, 128 P.2d 186, 189 (Calif. Dist. Ct. 1942).

(2)

The City tax may also be regarded as a nonproperty tax in lieu of a franchise tax because of the nature of its enactment. A state can impose a tax in two ways. First, it may directly enact and impose the tax itself. Second, it may delegate to a political subdivision its power and authority to enact a tax. Under this second method, there is no requirement that the tax enacted by the political subdivision be either similar to or different from any state tax.

In the present case, it cannot be denied that the State expressly granted to the City the right to impose the tax. It is imposed pursuant to a State enabling act, without which the City would have neither the right nor the power to impose it. Additionally, the enabling act was accompanied by a model local law, which is almost identical with the State franchise tax on corporations, mandating that any tax enacted pursuant to the enabling act be in substantial compliance with the model law. Further, the State can directly amend the enabling act, the model law, and even the City's Administrative Code. Thus, the State can revise or even eliminate the City's tax on its own volition. Accordingly, it would appear that the State, in authorizing the City to impose its tax, was delegating a part of its power to tax corporate franchises to the City.

(3)

Appellants argue that because the City does not grant a corporation's franchise, it cannot impose a franchise tax on that corporation.

Appellants ignore the relationship between a state and its political subdivisions. Cities are political subdivisions of a state created, among other matters, as agencies for the exercise of such governmental powers and functions of the state as may be entrusted to it. United States v. Wheeler, 435 U.S. 313, 320-21 (1978); City of Trenton v. State of New Jersey, 262 U.S. 182, 185-86 (1923).

A state can delegate its power to grant franchises. City of Poplar Bluff v. Poplar Bluff Building and Loan Association, 369 S.W.2d 764, 766 (Mo. Ct. of App. 1963); New York Central R.R. Co. v. Middleport Gas & Electric Light Co., 193 A.D. 273, 277, 184 N.Y.S. 221, 224 (4th Dep't 1920); McKittrick ex rel. City of

California v. Missouri Utilities Co., 339 Mo. 385, 96 S.W.2d 607, 618 (Mo. Sup. Ct. 1936).

It is also well settled that a state can allocate to a city revenue the state raised through its imposition of taxes. See Village of Elmira Heights v. Yungstrom, 272 A.D. 154, 157, 72 N.Y.S.2d 655, 658 (3d Dep't 1947); Commissioner of Corporations & Taxation v. City of Malden, 321 Mass. 46, 71 N.E.2d 601, 603 (Mass. Sup. Jud. Ct. 1947). Thus, the State here could have easily imposed a franchise tax at a higher rate than presently exists and then allocated a portion of that revenue to the City. Instead, the State delegated to the City the right to impose and collect a tax similar to the one it imposes itself.

Appellants fail to recognize that a franchise tax may be imposed either on the franchise "to do" or on the franchise "to be," or both. The franchise "to be" is the granting of a franchise in a corporate capacity. This is

often called the "corporate" franchise, and it has been held to be the property of the corporation. When taxed, it may be subject to an organization tax, payable only once, or it may be subject to an annual excise based on its continued exercise. Second is the franchise "to do," which is the privilege granted to a corporation, when organized as such, to perform certain acts or to carry on a certain business. It is a special or secondary franchise, as distinguished from the primary franchise "to be," and it may be taxed separately. 14A Fletcher, Cyclopedia of Law of Private Corporations §6954 (1980). Hence, while the State may be the only entity that can tax the franchise "to be," it is plain that there is no prohibition against the City taxing the franchise "to do."

Last, appellants neglect the time-honored rule that a state that grants a franchise can impose conditions or restrictions on its exercise

or enjoyment. Home Insurance Co., 134 U.S. at 600; California v. Central Pacific R.R. Co., 127 U.S. 1, 40 (1888); State ex rel. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, 53 S.W.2d 394, 397 (Mo. Sup. Ct. 1932).

The authority to establish or impose conditions is a right that flows from the sovereign's inherent powers as the original grantor of the franchise. Hence, the State may validly impose a tax that is restricted to a given locality within the State. In such a case, the conditions imposed by the State are valid and proper. In short, "[i]f the grantee [of a franchise] accepts the boon it must bear the burden." Monroe County Savings Bank v. City of Rochester, 37 N.Y. 365, 370 (1867). Cf. Western States Bankcard Association v. City and County of San Francisco, 19 Cal.3d 208, 561 P.2d 273, 280 (Calif. Sup. Ct. 1977) (having chosen corporate form for its peculiar benefits, bank may fairly and reasonably be

required to accept tax burdens necessarily attendant upon that form).

CONCLUSION

The appeal should be dismissed because it is from a decision based on an adequate and independent state ground. In the alternative, the appeal should be dismissed for want of a substantial federal question.

Dated: April 6, 1987

Respectfully submitted,

PETER L. ZIMROTH,
Counsel of Record,
Corporation Counsel of
the City of New York.

GLENN NEWMAN,
STANLEY BUCHSBAUM,
JAMES F. ELLER,

of Counsel.